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No. 85-1821

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF UTAH, DUCHESNE COUNTY, UTAH, UINTAH COUNTY, UTAH, ROOSEVELT CITY AND DUCHESNE CITY, UTAH,

Petitioners,

v.

UTE INDIAN TRIBE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE STATES OF SOUTH DAKOTA, ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the language of the Uncompahgre Act of August 15, 1894, implemented by the Act of June 7, 1897, and the Uintah Act of May 27, 1902, as amended, providing that the unallotted lands of these original Indian reservations shall be restored to the public domain, constituted clear language of disestablishment, as this Court has recognized, or whether the original reservation boundaries continue to exist because this Court's decision in *Solem v. Bartlett* changed the effect of such language, as the *en banc* majority of the court below held.

2. Whether the original Uncompahgre Reservation was disestablished in light of the express statutory language and the facts that the United States has not treated the disputed area as a reservation since 1897, that in 1965 the Tribe recovered damages from the United States on the basis that the Uncompahgre Reservation no longer existed, and that the population and land use in the disputed area are more than ninety percent non-Indian.

3. Whether the original Uintah Reservation was disestablished in light of the express statutory language and the facts that the United States did not administer the disputed area as a reservation for more than sixty years after the date of opening, that contemporaneous Presidential, Congressional and administrative treatment of the area showed that it was no longer considered a reservation, that more than half of the original reservation was made into a national forest and that the population and land use in the remaining area are more than ninety percent non-Indian.

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INTEREST OF THE STATES OF SOUTH DAKOTA ET AL.

This case presents an issue of substantial importance to the State of South Dakota and other states with present and former Indian reservations. The United States Court of Appeals for the Tenth Circuit has concluded that Acts of Congress with operative language restoring Indian reservations to the public

domain were not intended to disestablish those reservations. Pet. App. 1a-62a. The Court of Appeals premised its decision on a misreading of *Solem v. Bartlett*, 465 U.S 463 (1984), and plaintiffs in New Mexico and elsewhere are already specifically relying on this misreading to resurrect boundaries of Indian reservations long deemed disestablished.

In recent years South Dakota participated in *Solem* and two similar cases before this Court, *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The decision of the Court of Appeals conflicts in principle with all three of these cases. The *Amici Curiae* unequivocally support the petition for a writ of certiorari.

DISCUSSION

1. The *en banc* majority's rationale, premised on a misconstruction of the significance of "public domain" language, is of substantial concern to *amici*. Heretofore, the equation of public domain language with reservation disestablishment has been a universally accepted principle of federal Indian law. Throughout the Western States, Congress and the Executive Branch routinely utilized such terminology in the language and legislative history of Acts such as presented here. In South Dakota, for example, millions of acres of Indian reservations were "restored to the public domain".[1] Until the *en banc* majority's decision, no court seriously questioned that such operative language was not precisely suited to disestablishment. *Seymour v. Superintendent*, 368 U.S. 351, 354-55

[1] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 (1977). *See, generally, Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942).

(1962); *Mattz v. Arnett*, 412 U.S. 481, 504 n. 22 (1973). See, generally, *United States v. Pelican*, 232 U.S. 442 (1914).

Indeed, in 1975, when this Court framed the issue in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), it did so in terms of an underlying inquiry for "public domain" indicia:

> These two cases, consolidated for decision, raise the single question whether the Lake Traverse Indian Reservation in South Dakota, created by an 1867 treaty between the United States and the Sisseton and Wahpeton bands of Sioux Indians, was terminated *and returned to the public domain, by the Act of March 3, 1891*. *DeCoteau, supra* at 426-427. (Emphasis added).

Since the legislative history in *DeCoteau* indicated that Congress intended to restore the reservation to the public domain, the issue was decisively resolved. *See DeCoteau*, 420 U.S. at 441, where, after noting that the intended effect of the Act was made clear by the sponsors, this Court set forth in the text of the opinion two "public domain" excerpts from the Congressional Record ("surrender of a large portion of their reservation to the public domain"; "all this land is opened by this bill to settlement as a part of the public domain"). *Id.* at 439-441. In concluding, the Court reiterated this basic understanding:

> That the lands ceded in the other agreements were *returned to the public domain*, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation

> stated repeatedly that the ratified agreements would *return the ceded lands to the 'public domain.'* See *supra*, at 440-441. Cf. *Mattz v. Arnett*, 412 U.S. 481, at 504 n. 22.

DeCoteau, 420 U.S. at 446. (Emphasis added.)

Two years later, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), this aspect of the issue was treated essentially the same. *Rosebud*, 430 U.S. at 589, 600, 600 n. 21. Even the *Rosebud* dissent expressly acknowledged that "'restored to the public domain'" was "'clear language of express termination'". *Rosebud*, 430 U.S. at 618 (Marshall, J., dissenting).

In the instant case, the district court and the panel below premised their initial decisions on this fundamental understanding (Pet. App. 69a, 76a, 78a, 79a, 83a, 84a), as the *en banc* majority acknowledged (Pet. App. 17a-18a). Subsequently, however, this Court decided *Solem v. Bartlett*, 465 U.S. 463 (1984). The *en banc* majority's conclusion that *Solem* "dictated" a different result with respect to the crux of this case, the significance of operative public domain terminology, is explicitly stated:

> The original expression 'return to the public domain' does not reliably establish the clear and unequivocal evidence of Congress's intent to change boundaries. *Solem*, 104 S.Ct. at 1166 [majority opinion].
>
> Our *conclusion* is that the phrase 'restore to the public domain' is not the same as a congressional state of mind to disestablish [majority opinion].

> Although the district court and the panel viewed this as language of cession, I believe that *Solem dictates* a different result [concurring opinion].
>
> Prior to *Solem*, 'public domain' language could have been construed as more conclusive evidence of disestablishment; following *Solem*, the term must be viewed as *ambiguous* in portent. . . [concurring opinion].
>
> Ultimately, I interpret *Solem* to *hold* that 'public domain' language standing alone is *insufficient* to support a finding of explicit congressional intent to disestablish [concurring opinion].

Pet. App. at 11a-12a, 17a-18a. (Emphasis added). *Solem* clearly did not dictate this principle. *See* Pet. at 14-17, 19-21. Although the *en banc* majority addressed other points, some of which are noted below, it is evident that the ultimate conclusion centered around this fundamental misconstruction.

As a result, this Court is now presented with a conflict of even greater magnitude than the related issue presented in *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, ___ U.S. ___, 105 S.Ct. 3420 (1985):

> Because the Court of Appeals' decision appeared to *conflict in principle* with the decision of the Eighth Circuit in *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (*per curiam*), *cert. denied*, 449 U.S. 905, 101 S.Ct. 279, 66 L.Ed.2d 136 (1980), *we granted certiorari*, 469 U.S. ___, 105 S.Ct. 242, 83 L.Ed.2d 180. We now reverse.

Oregon, 105 S.Ct. at 3427 (Emphasis added). The importance of the principle resolved in *Oregon* (*i.e.* reservation rights remaining after cessions of Indian reservations) highlights the importance of the principle at issue here (reservation rights remaining after restoration of Indian reservations to public domain). Moreover, with respect to operative public domain language, the decision of the *en banc* majority unequivocally "conflicts in principle" with not just one circuit but all circuits—in fact, it appears to "conflict in principle" with all reported decisions that have addressed, indirectly or directly, the effect of a Congressional act or Executive order whose operative language restored an Indian reservation to the public domain. Pet. at 13-21. This controlling aspect of the opinion below, which influenced the *en banc* majority's view of other pertinent factors, thus clearly warrants review.

2. While *amici* unequivocally support and share the concern of Petitioners that the second largest Indian reservation in the United States (4,000,000 acres) has been resurrected in Utah as a result of this misconstruction, the sweeping mischaracterization of *Solem* by the *en banc* majority undermines this area of federal Indian law and is thus of even broader consequence.

The recent New Mexico cases, discussed by Petitioners at 12, where the plaintiffs specifically rely on this misreading of *Solem* by the *en banc* majority, will not be isolated examples. Nor is the list of twenty-nine public domain areas in other states cited by Petitioners, extensive as it is, all inclusive. Pet. at

11-12. Kappler identifies nine additional Orders in the short period of 1876 to 1883.[2]

Compounding the *en banc* majority's mischaracterization of *Solem* and making even more certain the predictability of additional litigation in these areas is the evaluation in a recent Comment in the *American Indian Law Review* that was awarded first place in the Indian Law Writing Competition at Harvard University:[3] The author there concludes, as did the *en banc* majority, that after *Solem* "[t]he category of statutory language terminating a reservation has been reduced by *eliminating* 'public domain' . . . the argument, *approved* in *Solem v. Bartlett*, that the pubic domain language in surplus land acts carried little meaning. . . .", *id.* at 69-70, 73 (Emphasis added). In context, the remarks in *Solem* obviously were not intended to support such a conclusion.[4] Nevertheless,

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[2] *See, e.g.* Exec. Order of October 30, 1876 (I Kappler 814) (White Mountain); Exec. Order of May 3, 1877 (I Kappler 821) (Mission Res.); Exec. Order of February 5, 1883 (I Kappler 823) (Mission Res.); Exec. Order of August 19, 1874 (I Kappler 856) (Blackfeet); Exec. Order of March 29, 1884 (I Kappler 885) (Turtle Mountain); Exec. Order of January 28, 1876 (I Kappler 889) (Malheur Res.); Exec. Order of September 13, 1882 (I Kappler 889-90) (Malheur Res.); Exec. Order of May 21, 1883 (I Kappler 890) (Malheur Res.); and Exec. Order of February 23, 1883 (I Kappler 904-05) (Chief Moses).

[3] Comment, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 A.I.L.Rev. 57 (1986).

[4] In contrast to the operative public domain language in the Utah Acts and Proclamations, the reference to public domain in *Solem* was an isolated one. Public domain terminology did not appear in the operative language of the *Solem* Act, and although the reference itself was deemed supportive of disestablishment,

that such a conclusion could be erroneously attributed to *Solem* shows how unsettling and disruptive the *en banc* majority's decision promises to be.

Authoritative review by this Court at this time will stem the tide of writs for *habeas corpus* and other actions, in precisely the same manner as in *DeCoteau*, when this Court acted decisively and reversed the decision of the Court of Appeals for the Eighth Circuit for a similarly fundamental misconstruction. *DeCoteau*, 420 U.S. at 430, 447. In the absence of such review, an inordinate expenditure of time, effort and resources will continue to be wasted on an issue that had been settled for decades.

3. *Solem.* If *Solem* can fairly be faulted with respect to a lack of clarity on the public domain issue, as has been suggested, then this Court's attention to other aspects of *Solem* at least merits additional consideration. Apart from the fact that South Dakota's position before this Court in *Solem* makes clear its view of the holding in *Solem*, the guidance of *Solem* in other respects leaves more to be desired. Insofar as the "fairly clean analytical structure" that *Solem* counsels, (465 U.S. at 470) even the *American Indian Law Review* Comment, *supra*, recognizes: "a contorted body of doctrine"—"two interpretations of the history of the allotment policy as applied to the surplus lands acts"—"two historical interpretations of what the allotment process meant for the reservation system: one, that it ended the reservations, and another, that it did not."—"The interpretations of sur-

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Solem noted that it was "hardly dispositive" when "balanced against" other persuasive evidence of continuing reservation status. *Solem*, 465 U.S. at 475. *See* the discussion in Pet. at 14-17, 19-21.

pius land acts is confused"—"The present case law, discussed below, is now so confused." *Id.* at 61, 62, 69.

In light of this lack of clarity, it is not difficult to understand the widely divergent views and marked disagreement below—or elsewhere for that matter. It is left to this Court to settle conclusively what *Solem* means and to state whether the Court intended to contradict more than a half a century of jurisprudence regarding the significance of public domain language.

a. Part of the apparent confusion may stem from a study that figured prominently in the *Solem* opinion. *Solem*, 465 U.S. at 466 n. 5, 477 n. 21, 479 nn. 22 & 23, 480 nn. 24 & 25. This study dealt only with the Cheyenne River Reservation. Subsequent to *Solem*, it was discovered that a prior comprehensive thesis of the allottment era (1880-1920) by the same author (1) significantly contradicts the author's *Solem* study and (2) expressly recognizes that the Utah Uintah Act and others "followed the model" of the 1904 *Rosebud* Act—the same Act that the *Rosebud* Court held reflected the baseline purpose of disestablishment in the *Rosebud* legislation.[5]

b. Although *Rosebud* effectively and correctly rejected the *Ash Sheep*[6] and related lingering-beneficial-interest argument, as "logically separate from the question of disestablishment", (*Rosebud*, 430 U.S. at 601, n. 23) and although *Solem* cites *Rosebud* with

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[5] F. Hoxie, *Beyond Savagery: The Campaign To Assimilate The American Indians, 1880-1920* at 390 (Univ. Microfilms 1977).

[6] *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920).

approval repeatedly, *Solem* also cites *Ash Sheep* with approval and again lends support throughout to the *Ash Sheep* and related lingering-beneficial-interest argument. *Solem*, 465 U.S. at 468. While *Solem* recognizes that it is now "settled law that some surplus land acts diminished reservations...and other surplus land acts did not. . .", (*Solem*, 465 U.S. at 469) it is doubtful that this Court really intended for a holding in a particular case to actually depend upon which analysis of the same argument a particular court might find persuasive. *Rosebud*, 430 U.S. at 601, n. 23; *Solem*, 465 U.S. at 469.

4. The *en banc* majority goes beyond *Solem* in several additional respects. Although not at issue, the court below initially describes this case as one involving lands and title to lands:

> . . .this writer agreed. . .who generally ruled that the Uintah Reservation *and its lands remained the property* of the tribes that are involved. As to the question of whether the acts dealing with the Uintah Forest and the Uncompahgre Reservation mean that *the Indians lost title to these lands*, the view of this writer is contrary to the view of the trial court.

Pet. App. 3a. (Emphasis added.) But the parties in this litigation were not contesting the title to the lands involved. Secondly, while this Court has held that opening land to settlement was not necessarily inconsistent with continuing reservation status, the

en banc majority initially "assumes the very question to be decided"[7]:

> Actually the intent was to open the reservation to non Indian settlers and this *couldn't* [disestablish the reservation].

Pet. App. at 4a. (Emphasis added.) But see, *DeCoteau* and *Rosebud*.

Moreover, while *Solem* did note that there are "limitations as to how far we will go to decipher congress's intent in any particular surplus land act" this Court has consistently and meticulously, on both the evidentiary and pragmatic level, at least considered all arguments. The court below categorically rejected this approach:

> No particular significance can be given to these articles since they were written from the white settlers' point of view.

Pet. App. 13a. *See DeCoteau*, 420 U.S. at 431, 432, where documentation similar to that rejected by the court below is set forth at length in the text of the *DeCoteau* opinion.

5. In other instances, the *en banc* majority simply ignores *Solem*. No particular significance is paid to the fact that the area in dispute encompasses more non-Indian land than any "Indian reservation" in the United States and is populated by over 90% non-Indians. Pet. at 9-10. *DeCoteau* and *Rosebud* discuss justifiable expectations at length, and *Solem* specifically notes that such pragmatic factors, not present

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[7] *Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777 (1984)

in *Solem*, were still entitled to considerable weight and consideration. *Solem*, 465 U.S. at 471. The *en banc* majority does not even discuss this aspect of *Solem*. In this instance, the "*Solem* standards" were ignored.

6. The *en banc* majority also ignores the fact that the United States has consistently taken the position that the Utah Uncompahgre Reservation ceased to exist because it was restored to the public domain. After nearly a century of reliance upon express representations of the United States, by the people, the courts, the state government and the Congress, the *en banc* majority should have at least discussed the merits of this position. This is especially so in light of the fact that the United States does not lightly conclude a reservation has been disestablished. In *Seymour*, *Mattz*, *Rosebud*, *DeCoteau* and *Solem* the United States argued against reservation disestablishment.

7. The *en banc* majority does not, however, neglect to mention that the Justice Department supported its conclusion with respect to the Uintah Reservation when it appeared for the United States as *amicus curiae*. However, the arguments of the United States have not been consistent with reference to the Act of February 8, 1887, 24 Stat. 388, (General Allotment Act). In *Seymour* and *Mattz* and until *DeCoteau*, the focal point of the position of the United States was the General Allotment Act of 1887. Because there were no major subsequent adjustments in federal Indian policy until 1934, the United States reasoned, logically, that any Congressional constancy in federal Indian policy *vis-a-vis* the surplus land statutes, must necessarily be tied to the General Allotment Act. The United States therefore concluded that surplus land

statutes subsequent to the enactment of the General Allotment Act were *not* intended by Congress to disestablish reservations. After this Court held in *DeCoteau* that Congress utilized the General Allotment Act in surplus land statutes to continue to disestablish Indian reservations after 1887, the United States abandoned its argument relying on Congressional constancy in federal Indian policy. In its stead, the United States substituted a case by case analysis based upon more subtle indicia of Congressional intent. According to this new argument of the United States, such an analysis must necessarily reflect that Congressional intent vacillated from time to time and from act to act. At any one time Congress might utilize a standard format intending to disestablish one reservation and the next time utilize the same or similar format not intending the same result. The concept of such vacillating Congressional intent is made more elusive by the fact that no Congressional enactment between 1887 and 1934 has yet surfaced to establish when such a fundamental shift in Congressional policy occurred. (Not only is the historical record *everywhere* silent with respect to any contemporary documentation to support such an argument, but it also affirmatively refutes the existence of such an ill conceived Congressional plan). Nevertheless, the United States maintains this is what Congress intended. Fortunately for Utah, the position of the United States with respect to the Uncompahgre Reservation does not hinge upon such subtleties.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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